

PUBLIC WORKS CONTRACT ARBITRATION COMMITTEE MINUTES

February 9, 2004

The meeting was called to order at 10:32 a.m. by Co-chairperson Kenn Kojima, representing the Department of General Services (DGS). Other voting members present were David McCosker and Tim McGowan, representing the construction industry; William McDonald, representing the Department of Water Resources; and Eugene Mallette, representing the Department of Transportation (Caltrans). Member Cecil Mark was not in attendance. Non-voting member Melissa Meith, Director of the Office of Administrative Hearings (OAH), was present. Others present included Heather Hoganson, OAH; Carol Rader, DGS; and Phoenix Vigil, OAH.

I. MINUTES OF THE JUNE 9, 2003 MEETING

The draft minutes of the June 9, 2003 meeting were adopted without change.

II. ADMINISTRATOR'S REPORT

Governor's Executive Order

OAH's Director Melissa Meith reported on the effect of Executive Order S-4-03 on the PWCA program. Without an exemption from the Department of Finance OAH is prohibited from entering into any new contracts or amending any existing contracts thereby preventing newer cases from having an arbitrator appointed and pending cases are prevented from going to hearing. When the parties in arbitration select an arbitrator, OAH collects deposits and then only upon receipt of those deposits enters into a contract for services with the arbitrator. Currently there are 56 active contracts with arbitrators and seven matters waiting for arbitrators to be appointed.

OAH's initial exemption request was denied. Although OAH has resubmitted its request for an exemption, Caltrans' exemption request has been approved and it is likely that their exemption may apply to OAH Caltrans' cases. Local agencies cases are exempt from the Executive Order.

Program deficient and filing fees

The Committee was provided a comparison of PWCA workload and expenses which indicates a significant shortfall in income versus expenses. Even with the June 1, 2002 increase in filing fees, the program is still seeing a substantial deficit. The Director asked the Committee for any suggestions to either increase the fees or lessen some of OAH's involvement in the process. The Director proposed requiring state agencies to enter into contracts with the arbitrators directly and/or have the arbitrator bill the parties directly thereby reducing OAH's accounting personnel needs.

The Director and the Committee questioned the PWCA program's current efficiency versus when the program was initiated. There appeared to be a general consensus that the program has become less useful and efficient since its establishment, however contractors may take some comfort in knowing that there is a remedy available to them. As OAH suffers the losses incurred by the program, the question was asked whether OAH has considered "getting out of the business," however absent legislative action, OAH cannot terminate the program.

The Committee was provided a comparison of PWCA filing fees to other similar arbitration programs' filing fees. Compared with AAA, the PWCA filing fees are substantially lower.

The possibility of an annual or case service fee was discussed. The Committee agreed that the raising of the filing fees was a viable solution.

Statistical report

The Committee was advised that the PWCA statistical report will now be available online although copies will still be provided to the Committee at the meetings.

Regulation status

Heather Hoganson, OAH Staff Counsel, advised the committee on the status of the regulation revisions. The current rulemaking package includes changes to Title 1, California Code of Regulations sections 1314, 1321, 1323, 1324, 1332, 1334, 1354, 1390, 1392, 1395, 1396 and 1398.

On October 16, 2003, the Office of Administrative Law (OAL) disapproved the regulations on technical grounds which in turn opened up a 120-day re-submittal period. Specifically, OAL requested a Form 399 (Statement of Economic and Fiscal Impact) from each department, a resolution from the California Water Commission, minor language changes to section 1395 and a technical change to section 1398.

On November 17, 2003, Governor Schwarzenegger issued Executive Order S-2-03. This required all agencies to cease processing regulations immediately and review all pending regulations for impacts on businesses, as well as review all regulations promulgated in the previous five years. OAH responded immediately. The reassessment of the PWCA rulemaking package was completed and approved by the Director of DGS on January 22, 2004.

OAL considers this rulemaking package as two parts: Regulations 1395 & 1398, dealing solely with arbitrator standards and qualifications, are "Committee Regulations" and the rest of the regulations are "jointly adopted by Departments of General Services, Transportation and Water Resources."

Section 1395 as submitted to OAL in August 2003 read:

Article 11. Certification of Arbitrators by the Public Works Contract Arbitration Committee

1395. Standards and Qualifications

- (a) Arbitrators should have substantial experience in or directly related to public works construction projects, particularly large-scale complex projects with or on behalf of federal, state or local governmental agencies. Extensive experience in the resolution of disputes arising out of such projects is desirable. Knowledge of California construction law is necessary.
- (b) Applicant qualifications are evaluated on an individual basis by the Public Works Contract Arbitration Committee. The experience in subdivision (a) may be met by a combination of factors, which should include any one or more of the following:
 - (1) Five or more years' experience at the managerial or supervisory level in public works construction contracting with extensive experience in the resolution of disputes arising out of public contract claims.
 - (2) Five or more years' experience as an attorney representing parties in negotiating, litigating, or arbitrating public works construction contract claims.
 - (3) Five or more years' experience as a judge or arbitrator. This should include extensive experience in adjudicating or otherwise resolving public works construction contract claims or other large-scale and/or complex commercial litigation.

Authority cited: Section 10245.3, Public Contract Code.

Reference: Sections 10240.5, 10240.7, and 10245.3, Public Contract Code.

The motion was made, seconded and approved to amend the language of section 1395 to read:

Article 11. Certification of Arbitrators by the Public Works Contract Arbitration Committee

1395. Standards and Qualifications

- (a) Arbitrators ~~should~~ shall have substantial experience in or directly related to public works construction projects, particularly large-scale complex projects with or on behalf of federal, state or local governmental agencies. Extensive experience in the resolution of disputes arising out of such projects is desirable. Knowledge of California construction law is necessary.
- (b) ~~Applicant qualifications are evaluated on an individual basis by the Public Works Contract Arbitration Committee.~~ The experience in subdivision (a) may be met by a combination of factors, which ~~should~~ shall include any one or more of the following:
 - (1) Five or more years' experience at the managerial or supervisory level in public works construction contracting with extensive experience in the resolution of disputes arising out of public contract claims.
 - (2) Five or more years' experience as an attorney representing parties in negotiating, litigating, or arbitrating public works construction contract claims.
 - (3) Five or more years' experience as a judge or arbitrator. This ~~should~~ shall include extensive experience in adjudicating or otherwise resolving public works construction contract claims or other large-scale and/or complex commercial litigation.
- (c) Applicant qualifications are evaluated on an individual basis by the Public Works Contract Arbitration Committee. The Committee has discretion to waive the qualifications of (a) and/or (b) on an individual's demonstration of equivalent qualifications.

Authority cited: Section 10245.3, Public Contract Code.

Reference: Sections 10240.5, 10240.7, and 10245.3, Public Contract Code.

A motion to amend section 1398 was made, seconded and approved to include a reference to the Committee's authority as suggested by OAL.

OAH will re-submit the rulemaking package on February 13, 2004, in order to act within the 120-day OAL timeline. OAH expects that the "Committee Regulations" (1395 & 1398) will be approved, and the rest disapproved, starting another 120-day timeline.

For the remaining regulations, OAH will need to obtain (within the new 120-day deadline):

- New Form 400 [Notice of Publication/Regulations Submission Form], signed by the Director or authorized delegate of DGS, Water, and CalTrans.
- Form 399 [Statement of Economic and Fiscal Impact], signed by the Agency Secretary or authorized delegate of Water and CalTrans.
- Water Commission approval.

III. REVIEW OF ARBITRATOR APPLICATIONS

Ernest Brown was certified to the arbitrator panel.

IV. NEW BUSINESS/PUBLIC COMMENT

No new business was presented.

V. SCHEDULING OF NEXT MEETING

The Committee voted to cancel the March 8, 2004 meeting.

The next meeting is scheduled for Tuesday, June 8, 2004 at 11:00 a.m.